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No. 91-1675

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

BERNARD A. ZARDA, SR., et al.,
Petitioners,

vs.

STATE OF KANSAS, et al.,
Respondents,

and

JERRY S. DEAN, et al.,
Petitioners,

vs.

STATE OF KANSAS, et al.,
Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. *ZARDA* AND *DEAN* CASES.

MAY A STATE'S STATUTORY TAX SCHEME, CONSISTENT WITH ESTABLISHED PRINCIPLES OF PROCEDURAL DUE PROCESS, REQUIRE EXHAUSTION OF ADMINISTRATIVE REMEDIES AS A CONDITION PREREQUISITE TO RECOVERY OF TAXES PAID?

B. *ZARDA* CASE.

DOES THE NO-EXHAUSTION RULE GENERALLY APPLICABLE TO CLAIMS MADE PURSUANT TO 42 U.S.C. §1983 APPLY TO CHALLENGES TO STATE TAX SCHEMES FILED IN STATE COURT?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Board of County Commissioners of Johnson County, Kansas, and William E. O'Brien, Johnson County Treasurer, respectfully submit the following brief in opposition to petitioners' Petition for Writ of Certiorari to the Supreme Court of the State of Kansas in the above captioned cases.

OPINIONS DELIVERED BELOW

The opinion of the Supreme Court of the State of Kansas in *Zarda v. State* is reported at 250 Kan. 364, 826 P2d 1365.

The opinion of the Supreme Court of the State of Kansas in *Dean v. State* is reported at 250 Kan. 417, 826 P2d 1372.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the Constitutional provisions, statutes and regulations cited by Petitioners, Respondents, in accordance with Sup. Ct. R. 14.1(f), have set forth the text of the following additional state statutes in Appendix A: K.S.A. 79-5103; K.S.A. 77-420; and K.S.A. 1991 Supp. 60-513.

STATEMENT OF THE CASES

THE ZARDA CASE

Effective January 1, 1981, most motor vehicles in the State of Kansas became subject to property taxes pursuant to the provisions of K.S.A. 79-5101 et seq., which requires that motor vehicle taxes be paid at the time of the annual vehicle registration pursuant to Chapter 8, Article 1 of the Kansas Statutes Annotated.

K.S.A. 79-5101 et seq. provides that the Kansas Department of Revenue shall annually adopt a valuation schedule for motor vehicles and annually certify the applicable mill levy for each of the 105 counties in the State, which shall be used in computing the tax imposed upon each vehicle. K.S.A. 79-5103 and K.S.A. 79-5105(c). There is virtually no discretion at the local level with respect to the valuation and taxation of motor vehicles.

K.S.A. 8-134 authorized the Department of Revenue to adopt regulations to implement a staggered vehicle registration system, allowing vehicles to be registered throughout the year, thus easing administration of the motor vehicle tax and registration laws. Pursuant to this authority, the Department of Revenue adopted Kansas Administrative Regulation (K.A.R.) 92-51-21, which became effective May 1, 1982. That regulation spreads motor vehicle registrations throughout eleven months of the year (February through December) based on the first letter of the vehicle owner's last name. K.A.R. 92-51-21 was approved as to legality by the Attorney General of the State of Kansas prior to its effective date pursuant to K.S.A. 77-420(c)(2).

Nevertheless, the same Attorney General who had approved the regulation in 1982 issued Opinion No. 90-100 on

Thursday, August 23, 1990, expressing the opinion that K.A.R. 92-51-21 worked a violation of the Equal Protection Clause of the Fourteenth Amendment as against those taxpayers whose surnames began with a letter toward the end of the alphabet.[1]

The problem arises, according to the opinion, as a result of the superimposition of K.A.R. 92-51-21 on K.S.A. 79-5105 which provides for annual 16% depreciation of all motor vehicles. The operation of K.A.R. 92-51-21, according to the opinion, works to delay the application of the 16% depreciation on vehicles owned by taxpayers whose last names start with letters toward the end of the alphabet.

In response to Attorney General Opinion No. 90-100, the Department of Revenue promulgated Temporary Regulation No. 92-55-2a on October 1, 1990, which became effective on January 1, 1991. Petitioners have conceded that the new regulation adequately solves the alleged "alphabet inequity problem." (Pet. 13).

On Monday, August 27, 1990, Petitioners filed their original petition in this case in the District Court of Shawnee County, Kansas, naming as Defendants the State of Kansas; Kansas Department of Revenue; Secretary of Revenue Ed Rolfs, and Steve Stotts, Director of Taxation (R.I, 11). Petitioners thereafter filed their first amended petition, naming as additional parties Defendant the Board of County Commissioners of Franklin; Johnson; Leavenworth; and Wyandotte Counties (R.I, 66).

Relying on Attorney General Opinion No. 90-100, Petitioners alleged that they had been "unlawfully and unconstitutionally discriminated against;" requested the certification of a

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[1]Kansas Attorney General's opinions are not binding upon the courts. *Wulfkuhle v. State Department of Revenue*, 234 Kan. 241, 248, 671 P.2d 547 (1988).

Plaintiffs' and Defendants' class; and sought relief by way of mandamus; declaratory judgment; "Recovery of all monies unlawfully collected through the implementation of the monthly staggered registration scheme;" injunctive relief and an accounting (R.I, 81).

Petitioners later filed a motion for leave to file a second amended petition, in which they alleged that "several Defendants are unclear as to certain claims against them. However, a fair reading of Plaintiffs' first amended petition alleges" a claim under 42 U.S.C. §1983 against the State and County Respondents (R.I, 864-865). It is unclear whether the District Court ever formally ruled on Petitioners' motion; however, the District Court did address the §1983 claim in its memorandum decision filed January 11, 1991 (R.I, 994-999).

On November 21, 1990, Petitioners filed an amended motion for class certification, seeking certification of a Plaintiffs' class defined as "All persons. . .registering for the first time one or more motor vehicles. . .in Kansas as required by. . .K.A.R. 92-51-21 between May 1, 1982 and December 31, 1990, and whose registration month was any month after February." (R.I, 532). In other words, Petitioners sought to certify a class that includes every person who has registered a vehicle in the State of Kansas since May 1, 1982 except those persons whose last names begin with the letter "A". This amended proposed Plaintiffs' class was based on the affidavit of Petitioners' expert, Dr. Richard Hoyt, whose opinion that "Each of the named Plaintiffs have [sic] suffered overcharges as a result of the staggered registration system. . ." is the sole evidence in the voluminous record in this case to support the proposition that the named Plaintiffs sustained damages as a result of the alleged inequity of the staggered registration system (R.I, 582). No attempt was ever made by the named Plaintiffs to set forth an actual amount

of damages that they allegedly incurred. Based upon the factual allegations contained in Petitioners' pleadings, the average "unconstitutional overcharge" for each vehicle in 1990 was $12.28.[2]

In response to Petitioners' petitions, all named Defendants filed motions to dismiss, relying primarily on the ground that Petitioners had failed to exhaust their administrative remedies (R.I, 178; 295; 309; 325; 335). By a memorandum decision filed January 11, 1991, the District Court sustained Defendants' motion (R.I, 991). Petitioners thereafter appealed to the Kansas Court of Appeals. The appeal was transferred to the Kansas Supreme Court on Petitioners' motion.

On February 28, 1992, the Kansas Supreme Court filed its opinion in the case. The Court framed the sole issue on appeal as whether the district court lacked subject matter jurisdiction on the ground that the named Plaintiffs failed to exhaust their administrative remedies. 250 Kan. at 365. Recognizing that the

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[2]Petitioners' expert, Dr. Hoyt, estimated that the "unlawful taxes collected from the Petitioners' class" in 1990 was $25,771,332 (R.I, 815); Petitioners further state that estimated total registrations in 1990 were 2,164,083 (R.I, 66). The Department of Revenue estimated that 65,560 of such 1990 registrations were attributable to "A" taxpayers (R.I, 656). 2,164,083 less 65,560 equals 2,098,523, all of which would fall into Petitioners' proposed class. $25,771,332 divided by 2,098,523 equals $12.28. In their Petition brief, p.16, n.39, Petitioners themselves state that ". . .the average class member's claim in *Zarda* approximates $133," which includes interest, for all nine tax years in which K.A.R. 92-51-21 was in effect. This amounts to a total claim per year of $14.77, inclusive of interest. It is axiomatic that mathematical exactitude is not expected or required in the valuation of property within a class for tax purposes. *Stanley v. Albany Co.*, 121 U.S. 535, 7 S.Ct. 1234, 30 L.Ed. 1000 (1886). See also *Allegheny Pittsburgh Coal Co. v. Webster Co.*, 488 U.S. 336, 344, 102 L.Ed.2d 688, 109 S. Ct. 633 (1989): "'It is not the theory, but the impact, . . .that counts,'" quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 88 L.Ed. 333, 64 S. Ct. 281 (1944).

"purpose and ultimate goal of Plaintiffs' challenge is to allow the recovery of motor vehicle taxes paid by them and others," 250 Kan. at 369, the Court held that the district court lacked subject matter jurisdiction to grant Petitioners the prayed-for tax relief by virtue of their failure to exhaust the administrative remedies available to them pursuant to K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426, 250 Kan. at 374. The Court further held that Petitioners' claims for declaratory and injunctive relief could have been pursued without first exhausting administrative remedies, 250 Kan. at 371, but that those claims were moot because "Plaintiffs' complaints do not extend to any taxation which occurred after December 31, 1990," 250 Kan. at 374. With respect to Petitioners' claim for damages and equitable relief pursuant to 42 U.S.C. §1983, the Kansas Supreme Court held that the rationale expressed in Justice Brennan's concurring opinion in *Fair Assessment in Real Estate v. McNary,* 454 U.S.100, 137, 70 L.Ed 2d 271, 102 S.Ct.177 (1981) applies equally to state court challenges to state taxation systems, and stated that "The Plaintiffs have failed to demonstrate how the remedies provided by K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426 are unclear, uncertain, incomplete, or inadequate. The Petitioners could have complied with K.S.A. 1991 Supp. 79-2005 and still have pursued their constitutional claims. Although constitutional claims cannot be acted upon by [the Board of Tax Appeals], such claims would be resolved by the district court on appeal." 250 Kan. at 374.

The administrative procedure cited by the Kansas Supreme Court, found at K.S.A. 1991 Supp. 79-2005 and K.S.A. 1991 Supp. 74-2426, requires a taxpayer to file a written protest at the time of payment of his or her taxes or no later than December 20, stating the grounds on which the taxes, or any portion thereof, are protested.

One of the grounds specifically enumerated is an illegal or void valuation or assessment. K.S.A. 1991 Supp. 79-2005(b). Within 15 days of receipt of the tax protest by the county appraiser, an informal meeting must be scheduled. Within five days of the informal meeting, the appraiser must notify the taxpayer of the results thereof. Within 30 days after notification of the results of the informal meeting, the taxpayer must file an application for refund with the Board of Tax Appeals (BOTA), which is docketed and set for hearing no later than 90 days after filing. K.S.A. 1991 Supp. 74-2426 then requires that a final order of BOTA be rendered and served within 120 days after the matter was finally submitted. An aggrieved party must then file a motion for reconsideration in accordance with K.S.A. 77-529. Once the motion for reconsideration is disposed of, the matter is subject to judicial review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 et seq. K.S.A. 1991 Supp. 79-2005 provides for tax refunds in meritorious cases.

The Kansas Supreme Court has repeatedly held that an aggrieved taxpayer must exhaust administrative remedies prior to resorting to the courts and that failure to do so deprives the court of subject matter jurisdiction. See cases cited by the Kansas Supreme Court in the *Zarda* opinion, 250 Kan. at pp. 367-368.

Contrary to Petitioners' assertions, Pet. 9 and 12, they had ample time to pursue their administrative remedies. Petitioners first filed their petition in Shawnee County District Court in August, 1990. Pursuant to K.S.A. 79-2005, they had until December 20, or the date they paid their 1990 motor vehicle taxes, whichever was later, to file their protest. As the Kansas Supreme Court observed, Petitioners "could have complied with K.S.A. 1991 Supp. 79-2005 and still have pursued their

constitutional claims. . ." 250 Kan. at 374.

THE DEAN CASE

The statutory scheme for ad valorem taxes on motor vehicles in the State of Kansas that is at issue in *Zarda* is also the basis for the claim made in *Dean*. In *Dean*, however, Petitioners alleged that the mill levy (or county average tax rate, as it is called in the statute at issue) used in tax year 1990 was erroneous. Kansas' statutory scheme for ad valorem taxes on motor vehicles is found at Article 51 of Chapter 79 of the Kansas Statutes Annotated. It was adopted by the legislature in 1979 and became effective in 1980. Taxes were first levied thereunder in 1981.

At issue in *Dean* is K.S.A. 79-5105(c), which states:

> [A tax is hereby levied upon every motor vehicle, as the same is defined by K.S.A. 79-5101. . .which shall be determined by] multiply[ing] the taxable value of the motor vehicle produced under (b) above by the county average tax rate for the next preceding tax year.
>
> The "county average tax rate" for a county means the total amount of general property taxes levied within the county by the state, county and all other taxing subdivisions levying such taxes within such county divided by the total assessed tangible valuation of property within such county as of November 1 of such year as certified by the secretary of revenue.

Beginning in 1981, the first year taxes were levied und K.S.A. 79-5105, the Secretary of Revenue certified coun average tax rates to each of the 105 Kansas counties based

1979 data. Hence, the county average tax rates for 1981 were calculated using total general property taxes and total tangible assessed valuations from 1979 and so on through the present year (R. VIII, Clark TR. 11-15). These county average tax rates are certified annually by the Secretary of Revenue to the Director of Motor Vehicles, both of whom are officers of the Kansas Department of Revenue. The Director of Motor Vehicles uses the information to prepare the tax tables for the collection of motor vehicle taxes (R.VIII, Clark TR., 11). The annual certifications indicate that the county average tax rates for Johnson County for the motor vehicle tax years 1981 to 1992 are as follows:

1981: .105631 (based on 1979 data)
1982: .117549 (based on 1980 data)
1983: .123409 (based on 1981 data)
1984: .122736 (based on 1982 data)
1985: .136064 (based on 1983 data)
1986: .139299 (based on 1984 data)
1987: .141005 (based on 1985 data)
1988: .146833 (based on 1986 data)
1989: .165271 (based on 1987 data)
1990: .177583 (based on 1988 data)
1991: .106749 (based on 1989 data)
1992: .111132 (based on 1990 data)
(R.VII, deposition exhibit 2)

It can readily be seen that, except for 1984 and 1991, the Johnson County average tax rates for motor vehicle taxes went up each year. The annual upward trend of county average tax rates is typical throughout the state. (See *Zarda* record, R. II, Rolfs TR., 49, 53). Petitioners fail to advise this court that, if they are correct that they were overcharged for motor vehicle taxes in 1990, they were also undercharged every prior and subsequent year except

for 1983, including the current year. The Johnson County Treasurer clearly would have the authority to collect past due motor vehicle taxes pursuant to K.S.A. 79-5116 if Petitioners ultimately were to prevail in their interpretation of K.S.A. 79-5105(c), effectively eliminating any recovery for the year 1990.

Petitioners first attempted to bring this action as an original action in mandamus in the Kansas Supreme Court, which was dismissed pursuant to Supreme Court Rule 9.01 on December 7, 1990. On December 10, 1990, counsel for Petitioners filed the *Dean* case in the District Court of Johnson County, Kansas (R.I, 2). In *Dean*, the only county Defendant was William E. O'Brien, Johnson County Treasurer. On January 3, 1991, counsel for Petitioners filed *Underwood, et al. v. State of Kansas, et al.*, in the District Court of Johnson County, Kansas (R.I, 586). In *Underwood*, the named Petitioners named 77 county treasurers, including the Johnson County Treasurer, as party Defendants and additionally claimed that they were entitled to relief under 42 U.S.C. §1983. Otherwise, the *Dean* and *Underwood* petitions are identical.

Petitioners' petitions sought recovery of 1990 motor vehicle taxes on the ground that those taxes were calculated using the wrong mill levy and sought equitable relief by way of mandamus, declaratory judgment and injunction. Inexplicably, Petitioners further alleged in *Underwood* that they were entitled to relief pursuant to 42 U.S.C. §1983. Finally, Petitioners sought certification of a class of all persons who had registered and paid taxes on motor vehicles in 1990 in the 77 counties represented in the action. The 77 county treasurers in *Underwood* were named as parties Defendant because, in those counties, the mill levies dropped in 1989, an aberration attributable to state-wide reappraisal in 1989. (R.I, 605-606). *Dean* and *Underwood* were consolidated before the Honorable Larry

McClain, Johnson County District Court Judge (R.I, 1).

The Respondents filed motions to dismiss based primarily on the ground that Petitioners had failed to exhaust their administrative remedies (R.I, 124; 127; 152; 155; 158; 175; 211). The parties additionally briefed the issue of statutory construction of K.S.A. 79-5105(c) (R.I, 244; 295; 401; 409). By a journal entry filed March 19, 1991, the District Court ruled that it lacked subject matter jurisdiction over Petitioners' claims due to their failure to exhaust administrative remedies (R.III, 3-4). Petitioners thereafter appealed to the Kansas Court of Appeals. The case was transferred to the Kansas Supreme Court on Petitioners' motion.

On February 28, 1992, the opinion of the Kansas Supreme Court was filed. In its opinion, the court identified the issue on appeal as whether the district court lacked subject matter jurisdiction over Petitioners' cause of action on the ground that Petitioners had failed to exhaust their administrative remedies. Recognizing that Petitioners' prayer for equitable relief, as well as tax refunds, was directed solely to the tax year 1990, and further recognizing implicitly that further pursuit of equitable relief beyond 1990 would cause Petitioners' motor vehicle tax liabilities to increase, the Kansas Supreme Court held that exhaustion of administrative remedies as set forth in K.S.A. 79-2005 and 74-2426 is a condition prerequisite to seeking recovery of taxes paid and that Petitioners' prayer for injunctive and declaratory relief was moot. The court did not rule on the statutory construction issue presented in the case, but noted, however, that the legal interpretation of a statute by the agency charged with its interpretation is entitled to "great judicial deference"; 250 Kan. at 422, quoting *State Ex Rel. Stephan v. Kansas Racing Comm'n*, 246 Kan. 708, 719, 792 P.2d 971 (1990). The Court addressed, but did not analyze,

Petitioners' §1983 claim. 250 Kan. at 423-424.

Since Petitioners initially filed this action as an original action in the Kansas Supreme Court in November, 1990, they would have had adequate time to pursue their administrative remedies via K.S.A. 79-2005, which allows tax protests to be filed until December 20 or the date taxes are paid.

REASONS FOR DENYING THE WRIT

As demonstrated herein, the Kansas Supreme Court's decisions in *Zarda* and *Dean*, insofar as they reach federal questions, are completely in accord with decisions of this court, as well as all other courts addressing the same federal questions. The criteria for granting a petition for writ of certiorari as set forth in Supreme Court Rule 10 are wholly absent in the cases at bar.

A. THE KANSAS SUPREME COURT'S DECISIONS IN *DEAN* AND *ZARDA* ARE IN ACCORD WITH ESTABLISHED PRINCIPLES OF PROCEDURAL DUE PROCESS

(*Zarda* and *Dean*)

The first federal question raised in *Zarda* and the only federal question raised in *Dean*[3] is whether a state may, consistent with established principles of procedural due process, require exhaustion of administrative remedies as a condition prerequisite to recovery of taxes paid. This issue has long been settled in this court, most recently in *McKesson v. Florida Alcoholic Beverages and Tobacco Div.*, 496 U.S. 18, 110 L.Ed.2d

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[3]In *Dean*, this Respondent has consistently taken the position that no cause of action under §1983 has been, or could be, stated. In *Dean*, Petitioners complain that the Kansas Department of Revenue allegedly used the wrong mill levy to calculate 1990 motor vehicle taxes, which is an alleged violation of state law, to be sure, but does not implicate any constitutional protection. In their petition in *Underwood*, Petitioners allege that, "...It would be totally unlawful and a violation of constitutional due process if only those persons who uncovered the unlawful tax scheme and filed a timely administrative appeal be paid back. Further, the fact that the plaintiffs and class members are required to pay the taxes in full at the time of registration coupled with the unavailability of interest recovery on the unlawful amounts collected through the administrative process and the lack of a clear and certain post-deprivation remedy results in unconstitutional takings by the Defendants providing remedies to the Plaintiffs pursuant to 42 U.S.C. §1983." The foregoing is the only allegation alluding to §1983 in Petitioners's pleadings in *Dean/Underwood*. This Respondent argued that the fallacy of Petitioners' §1983 allegation was self-proving: If Petitioners were correct that they should not be required to exhaust administrative remedies, then their state court action was their due process; conversely, if Respondents were correct that Petitioners were required to exhaust their administrative remedies to obtain tax refunds, then those remedies constituted their due process. Respondents stand by their analysis of Petitioners' purported §1983 claim and for purposes of this brief, assume that Petitioners have raised an issue relating to the substantive law of procedural due process in the *Dean* case.

17, 110 S.Ct. 2238 (1990), upon which Petitioners heavily rely.

Petitioners imply, but cannot argue, that they themselves were precluded by State law from pursuing the administrative remedies available to them, if they could have established that they were entitled to tax refunds at all. Rather, Petitioners argue that the members of the uncertified class which they purport to represent were precluded from pursuing their administrative remedies due to the "subtle" nature of their substantive claims coupled with the requirement that a taxpayer must pay taxes under protest, or file a protest no later than December 20 of the tax year in question, to be eligible for a tax refund under K.S.A. 79-2005. In *McKesson, supra,* the very case upon which Petitioners most heavily rely, this Court explicitly approved of the imposition of procedural requirements by states upon taxpayers seeking refunds of taxes paid. In that case, the Court states:

> .. .A state's freedom to impose various procedural requirements on actions for post deprivation relief sufficiently meets this concern [over the state's ability to engage in sound fiscal planning] with respect to future cases. *The state might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint. . .*110 S.Ct. at 2254. (Emphasis added).

The foregoing was further explanatory of the Court's comment in Footnote 4 of its opinion, 110 S.Ct. at 2243-4, that, upon remand. . ."the state may invoke, as an independent basis for refusing to provide a refund, Petitioner's failure to comply with a notice requirement that was in effect at the time of Petitioner's tax payments." What is required by the Due Process Clause is a

"clear and certain" post-deprivation remedy that allows taxpayers to obtain tax refunds in a meritorious case. Id. at p. 2251.

The only attack upon the clearness and certainty of Kansas' post-deprivation tax refund procedure that is raised by Petitioners is the unavailability of the class action device. This argument has been soundly rejected by all the courts that have addressed the issue. See *Coleman v. McLaren*, 631 F.Supp. 749, 762 (N.D.Ill., 1986), aff'd. 796 F.2d 477 (Cir.7, 1986); *Waldron v. Collins*, 788F.2d 736, 738-9 (Cir.11, 1986), cert. denied, 479 U.S. 884 (1986); *Melof v. Hunt*, 718 F.Supp. 877, 884 (M.D.Ala., 1989) (state administrative remedies not "inefficient" or "inadequate" within meaning of Tax Injunction Act, 28 U.S.C. §1341, due to lack of class action procedure).

Those state courts that have addressed the issue have uniformly held that, where the named Plaintiffs were otherwise properly before the Court, they could not pursue a class action to recover allegedly illegally assessed taxes. See *1983-1984 County Tax Levy by Box Butte Co.*, 374 N.W. 2d 235 (Neb., 1985) ["The general rule is that an action to recover taxes illegally assessed cannot be maintained as a class action."]; *Hoffman v. Colorado State Board of Assessment*, 683 P.2d 783 (Colo., 1984) ["The general rule is that a Court lacks jurisdiction to grant [tax] relief if a plaintiff has not exhausted his administrative remedies. . .This is especially true in class relief cases. . ."]; *Conklin v. Town of Southampton*, 529 N.Y.S. 2d 517 (1988) ["Class certification was inappropriate where government actions are involved and subsequent plaintiffs will be adequately protected by the doctrine of stare decisis. . ."]; *Duffy v. Wetzler*, 555 N.Y.S. 2d 543 (1990) [In §1983 action,. . ."A class action may not be used to protect members of the proposed class who paid the tax without registering a protest. . ."]; *Aronson v. Commonwealth*, 516 N.E. 2d 137 (Mass., 1987) [In a Commerce

Clause challenge to state tax, "where. . .an attempt is made to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers, the procedures of the administrative process should not be bypassed. . .A class should not be certified in actions of this character."]

In arguing that class action relief is mandated by the Due Process requirement of "clear and certain" retrospective tax relief, Petitioners put the cart before the horse. Petitioners, and those taxpayers whom they would represent, consistent with the mandates of procedural due process, may be required to seek such monetary relief in accordance with a State's established administrative procedure prior to being entitled to seek their legal remedies in the Courts. To hold otherwise not only would be illogical, since the Courts always have broad discretion in deciding whether or not to certify a class, see generally, Wright, Miller & Kane, *Federal Practice & Procedure*, §1785, but also would constitute a threat to a government's financial stability, and ultimately to the well-being of its citizens. *McKesson, supra*, 110 S. Ct. at 2250-2251.

Finally, Petitioners argue that "No statute of limitations stands in the way of Petitioners' claims for refund," thus justifying their inflated representations of the amounts of their claims, both individually and class-wide. No Kansas statute expressly provides for a limitation period in which to bring an action for recovery of taxes paid. However, it is inconceivable that the Kansas Courts would conclude that no Kansas statute of limitation would otherwise apply to Petitioners' claims, assuming that compliance with the administrative procedure's timetable was not required. The most appropriate would appear to be K.S.A. 1991 Supp. 60-513, a two-year statute of limitation applicable to, inter alia, "an action for taking, detaining or injuring personal property, including actions for the specific recovery thereof,"

and "an action for injury to the rights of another, not arising on contract, and not herein enumerated." K.S.A. 1991 Supp. 60-513 is additionally applicable to §1983 actions arising in Kansas. *Johnson v. Johnson Co. Comm'n*, 925 F.2d 1299 (Cir.10, 1991).

B. THERE IS NO CONFLICT AMONG THE STATES RELATIVE TO THE APPLICATION OF THE §1983 NO-EXHAUSTION RULE TO STATE COURT TAX CHALLENGES

(ZARDA)

Contrary to Petitioners' assertions, those state courts that have addressed the issue have uniformly held that the no-exhaustion rule as enunciated in *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) does not apply to §1983 damages claims challenging state tax schemes filed in state courts. See cases collected in Brief of Respondents State of Kansas, et al., p. 9. These state court decisions have relied principally on *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981), in which this Court held that principles of comity prohibit a federal court from entertaining §1983 damages claims for the same policy reasons that the Tax Injunction Act, 28 U.S.C. §1341, prohibits federal courts from entertaining claims for equitable relief in actions challenging state taxation schemes. The common rationale underlying these state court decisions was recently articulated in *Nutbrown v. Munn*, 811 P.2d 131, 138-139 (Or. 1991), cert. denied _____ U.S. _____, 116 L.Ed.2d 773, 112 S.Ct. 861 (1992), in which the Oregon Supreme Court stated:

> We understand *McNary* to hold that, given

> the prime importance of non-interference with state taxing practices, Congress' purposes in enacting 42 U.S.C. §1983 will not be defeated by requiring that complaining taxpayers first exhaust their state administrative remedies. If Congress' purposes will not be defeated by such a requirement in federal court, we cannot conceive how those purposes would be any more thwarted by imposition of precisely the same kind of procedural requirement when the §1983 action is brought in state court. . .

The Kansas Supreme Court applied the same rationale to the cases at bar.

Finally, Petitioners urge as another basis for granting certiorari that there is a "conflict" between *Will v. Michigan Department of State Police*, 491 U.S. 58, 105 L.Ed.2d 45,109 S.Ct. 2304, (1989), which held that states are not "persons" for purposes of §1983, and *McKesson, supra*. In response, these Respondents are obliged to point out that the Kansas Supreme Court did not address the issue presented in *Will* in either *Dean* or *Zarda* and for this reason alone, Petitioners' argument based thereon is not appropriate.[4] In addition, contrary to Petitioners' argument, there is no conflict between *Will* and *McKesson* because the latter case was not a §1983 case. It is one thing to raise a constitutional argument, and another to allege a cause of action under §1983, a distinction Petitioners have yet to recognize. If there is any seeming conflict between *Will* and any

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[4]The County Defendants argued that no §1983 damages claim would lie against them because Plaintiffs' alleged damages arose out of the application of state law administered by state officials pursuant to state regulations. See *Chaloux v. Killeen*, 886 F.2d 247 (Cir.9,1989) and *Familias Unidas v. Briscoe*, 619 F.2d 391 (Cir.5, 1980). Contrary to Petitioners' statement in their Petition, p. 25, the County defendants did not argue that *Will* applied to them.

subsequent decisions of this Court of the type contemplated by Petitioners it is with *Dennis v. Higgins*, 498 U.S. _____, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991), in which a majority of this Court recognized the Commerce Clause as a basis for a §1983 claim in a case brought against state officials in a state court. However, *Dennis v. Higgins* clearly contemplated the cognizability of a claim for prospective relief under §1983 against state officials, thus coming under the footnote 10 exception in *Will*.

CONCLUSION

The *Dean* and *Zarda* decisions of the Kansas Supreme Court are in complete accord with the decisions of this Court and with all other state and federal courts that have addressed the same issues. These Respondents respectfully request that the Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

Excerpts from Kansas Statutes Annotated

K.S.A. 1991 Supp. 60-513. Actions limited to two years. (a) The following actions shall be brought within two years:

(1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(b) Except as provided in subsection (c), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonable ascertainable to the injured party, but in no event shall an action be commenced more-than 10 years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably

ascertainable to the injured party, but in no event shall such an action be commenced more than four years beyond the time of the act giving rise to the cause of action.

(d) The provisions of this section as it was constituted prior to July 1, 1987, shall continue in force and effect for a period of two years from that date with respect to any act giving rise to a cause of action occurring prior to that date.

K.S.A. 77-420

(b) Every rule and regulation proposed by any state agency which has been approved by the secretary of administration as provided in subsection (a) before being adopted or filed shall be submitted to the attorney general for an opinion as to the legality of the same, and the attorney general shall promptly furnish an opinion as to the legality of the proposed rule and regulation so submitted. Every rule and regulation submitted to the attorney general under this subsection (b) shall be accompanied by a copy of any document which is adopted by reference by the rule and regulation. Every rule and regulation approved by the attorney general under this subsection (b) shall be stamped as approved and the date of such approval shall be indicated therein.

(c) No rule and regulation shall be filed by the secretary of state unless:

(1) The organization, style, orthography and grammar have been approved by the secretary of administration;

(2) the rule and regulation has been approved in writing by the attorney general as to legality;

(3) the attorney general finds that the making of such rule and regulation is within the authority conferred by law on the state agency submitting the same;

(4) the rule and regulation has been formally adopted by the state agency after it has been approved by the secretary of administration and the attorney general and is accompanied by a certified or other formal statement of adoption when adoption is by an executive officer of a state agency, or by a certified copy of the roll call vote required for its adoption by K.S.A. 77-421, and amendments thereto, when adoption is by a board, commission, authority or other similar body;

K.S.A. 79-5103

For the year 1981 and thereafter, the department of revenue shall annually adopt a schedule for determining the value of all motor vehicles, the model year of which is 1981 or thereafter, as of the time they are first offered for sale as new motor vehicles. Such schedule shall be adopted as a part of the rules and regulations adopted by the secretary of revenue for such purpose. Such schedule shall show the classification of all such motor vehicles in accordance with K.S.A. 79-5104 based upon the value so determined. In formulating such schedule, the secretary may use the trade-in value for each particular make and model as developed form national market reports or other similar, nationally recognized publications.

In the event the secretary of revenue is unable to ascertain a value by this method in respect to any motor vehicle by reason of the same being a specifically constructed motor vehicle, or for any other reason, the county appraiser shall determine, from any information available, a comparable value of such vehicle pursuant to rules and regulations adopted by the secretary of revenue for such purpose.

(b) The classification determined by the county appraiser under the provisions of subsection (c) of K.S.A. 79-5102 shall be used in computing the tax imposed upon such motor

vehicles in the year 1981 and each year thereafter.

(c) The county appraiser shall classify all motor vehicles, the model year of which is 1980 or prior thereto, which are registered for the first time in the state or the registration of which is transferred in the year 1981 or thereafter, in accordance with the schedule provided by the secretary of revenue for the classification of motor vehicles by such appraiser in the year 1980 as provided in subsection (c) of K.S.A. 79-5102. Such classification shall be used in computing the tax imposed upon such motor vehicles in the year of their first registration or transfer and each year thereafter.

(d) The county appraiser shall classify all motor vehicles, the model year of which is 1981 or thereafter, in accordance with the schedules provided by the secretary of revenue for such purpose under the provisions of subsection (a) of this section. Such classification shall be used in computing the tax imposed upon such motor vehicles in the year of registration or transfer and each year thereafter.